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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALEX BOHANEK,

Plaintiff and Respondent,

Plaintiffs and Appellants,

E069804 v.

ROGER BALLIGER et al., (Super.Ct.No. MVC1500151)

Defendants and Appellants.

OPINION

ROGER BALLIGER et al.,

v.

(Super.Ct.No. RIC1500472)

ALEX BOHANEK,
Defendant and Respondent.

APPEAL from the Superior Court of Riverside County. Steven D. Cunnison and Sunshine S. Sykes, Judges.* Affirmed with directions.

^{*} Judge Sykes signed the December 7, 2017, judgment and Judge Cunnison heard the oral settlement agreement and presided over the August 30, 2017, order to show cause hearing. Judge Cunnison is a retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Roger Balliger and Charity Balliger, in pro. per., for Plaintiffs, Defendants, and Appellants.

Law Offices of Robert A. Krasney and Robert A. Krasney for Plaintiff, Defendant, and Respondent.

I. INTRODUCTION

Plaintiffs, defendants, and appellants, Roger Balliger and Charity Balliger (defendants), appeal from a \$22,500 money judgment entered against them on December 7, 2017, in favor of plaintiff, defendant, and respondent, Alex Bohanek (plaintiff). The judgment was entered after the court granted plaintiff's motion to enter judgment on the parties' oral settlement agreement, which the parties entered into *in court* on July 24, 2017. (Code Civ. Proc., § 664.6.)¹

In this appeal from the judgment, defendants raise two claims of error. First, they claim they are not bound by the oral settlement agreement and the judgment must be set aside because the court (Judge Cunnison) effectively "vacated" the parties' July 24, 2017, oral settlement agreement when, on August 30, 2017, the court set a January 12, 2018, trial date in the action. The record does not support this claim. The court did not vacate the parties' oral settlement agreement when it set the trial date, and the parties are bound by their oral settlement agreement.

Second, defendants claim the court (Judge Sykes), after granting plaintiff's section 664.6 motion to enforce the judgment, erroneously signed an "incomplete and inaccurate

¹ Undesignated statutory references are to the Code of Civil Procedure.

judgment" by omitting the \$500 monthly payment terms of their oral settlement agreement. We agree. We affirm the judgment with directions to modify the judgment to include the \$500 monthly payment terms the parties agreed to in their oral settlement agreement. In all other respects, we affirm the judgment.

II. BACKGROUND

A. The Parties' July 24, 2017, Oral Settlement Agreement

In court on July 24, 2017 (the original trial date in this action), the parties entered into an oral settlement agreement of this entire action.² (§ 664.6.) The oral settlement agreement required defendants to pay plaintiff \$22,500, in monthly installments of \$500, beginning on September 1, 2017, and continuing on the first day of each month thereafter (for 45 total months), until the \$22,500 sum was fully paid.

At the same time, the parties orally agreed to enter into a written settlement agreement reflecting the \$22,500 settlement amount, the \$500 monthly payment terms, and a mutual general release of all known and unknown claims arising out of this action and all other prior litigation between the parties. (Civ. Code, § 1542.) The parties agreed this action would be dismissed after they signed a written settlement agreement, but the oral settlement agreement was not made subject to or conditioned upon the parties' signing a written settlement agreement.

² Plaintiff originally filed an unlawful detainer complaint against defendants in Riverside County Superior Court case No. MVC1500151, but that matter was converted to a civil action after "possession was no longer an issue." A related civil matter in Riverside County Superior Court case No. RIC1500472 was consolidated with this case, but that matter was later dismissed.

The court (Judge Cunnison) approved the parties' oral settlement agreement, made it an order of the court, and told the parties it would be enforceable pursuant to section 664.6. The court also ordered the parties to appear in court on August 30, 2017, to show cause why they should not be sanctioned in a sum not exceeding \$500, if a "final" written settlement agreement had not been signed by August 30.³

B. The August 30, 2017, OSC Hearing and Trial Date Setting

On August 30, 2017, the parties appeared and told the court they had still not signed a written settlement agreement. The court (Judge Cunnison) set a January 12, 2018, trial date in the action, and the case was to be tried before Judge Sykes. The court discharged the OSC and said it would determine "who [was] at fault" for not signing plaintiff's proposed written settlement agreement based on a reporter's transcript of the July 24, 2017, oral settlement agreement—if the parties would provide the reporter's transcript to the court.

C. Plaintiff's Motion to Enforce the Oral Settlement Agreement

Defendants did not pay the \$500 installment payment that was due on September 1, 2017, pursuant to the parties' oral settlement agreement. On September 22, 2017, plaintiff filed a motion to enforce the oral settlement agreement by entering judgment on the oral settlement agreement. (§ 664.6.)

³ On July 26, 2017, two days after the parties entered into their oral settlement agreement in court, the clerk of court issued notice of an order to show cause (OSC) hearing, on August 30, 2017, regarding the filing of a request for dismissal of the entire case. (Cal. Rules of Court, rule 3.1385(b) [subject to exceptions not applicable here, each party seeking affirmative relief must serve and file a request for dismissal of the entire case within 45 days after the case is settled].)

Defendants filed opposition to the motion, claiming (1) the parties had reached "an impasse" on the terms of the written settlement agreement, and (2) defendants believed the court had "vacated" the oral settlement agreement when, on August 30, 2017, the court set the January 12, 2018, trial date in the action. Defendants argued they were entitled to be relieved—ostensibly from the court's July 24, 2017, order confirming the oral settlement agreement—pursuant to section 437, subdivision (b), which authorizes the court to relieve a party from a judgment, dismissal, order, or other proceeding taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect.

In reply, plaintiff noted that defendants were not contesting the terms of the oral settlement agreement; they were only disputing whether *additional terms* should be included in the written settlement agreement. Plaintiff argued the terms of the oral settlement agreement were "certain" and "specific," that no other terms were necessary to form a binding settlement agreement or contract, and the oral settlement agreement was never made conditioned on or subject to the parties' signing a written settlement agreement or a mutual general release of claims.

D. The Court Grants Plaintiff's Motion to Enforce the Oral Settlement Agreement

Following a November 8, 2017, hearing, the court (Judge Sykes) granted

plaintiff's motion to enforce the parties' oral settlement agreement. The court agreed

with plaintiff's position that defendants "[weren't] really contesting the terms of the

[oral] settlement that were made on the record," but were instead contesting "whether or

not additional terms could be added or additional terms have been negotiated." The court

also found that the oral settlement agreement was "a valid and binding" settlement agreement, that was reached by the parties "on the record" before the court, and that the oral settlement agreement was not made subject to or conditioned on the execution of a written settlement agreement.

The court also rejected defendants' claim that the oral settlement agreement was vacated on August 30, 2017, when Judge Cunnison set a January 12, 2018, trial date in the action. The court said: "[T]here's nothing in the record that indicates the settlement was vacated. It's just absent. Settlement was not vacated by Judge Cunnison on August 30th." The court further explained that Judge Cunnison "did not find that the oral agreement was not enforceable via any type of motion. He didn't address the issue of enforcement whatsoever." The court also rejected defendants' claim that they were entitled to relief based on their mistake, surprise, or excusable neglect (§ 473, subd. (b)), saying defendants were not "attacking whether a valid settlement was entered into. They're basically attacking their belief that the settlement was vacated by Judge Cunnison, which simply just was not done."

E. The December 7, 2017, Judgment and Defendants' Appeal

Near the conclusion of the November 8, 2017, hearing on plaintiff's motion to enforce the oral settlement agreement, the court directed plaintiff to prepare a proposed judgment reflecting "the exact terms" of the oral settlement agreement, "that being . . . [defendants] are to pay [plaintiff] the sum of \$22,500, which will be paid by monthly payments of \$500, commencing on September 1st, 2017, until paid in full."

The court then asked the parties' counsel whether those were the "full terms" of the oral settlement agreement, and each counsel said they were. Plaintiff's counsel also told the court he would "check to make sure" the proposed judgment would "comport" with "the transcript of the oral proceedings from [July] 24th."

Plaintiff later submitted and the court (Judge Sykes) signed the December 7, 2017, judgment, but the judgment omits the \$500 monthly payment terms. The judgment states: "Judgment in the sum of **\$22,500.00** is entered in favor of Plaintiff and Cross-Defendant, Alex Bohanek, and against Defendants and Cross-Complainants, Roger Balliger and Charity Balliger jointly and severally."

On January 10, 2018, plaintiffs filed a timely notice of appeal from the December 7, 2018, judgment.⁴

⁴ On January 31, 2018, defendants filed an ex parte motion (1) to amend the judgment pursuant to section 473, subdivision (b), to reflect "the exact terms" of the parties' July 24, 2017, oral settlement agreement, and (2) to stay execution of the judgment and a wage garnishment which was scheduled to commence on February 9, 2018, on the ground defendants were not in default of the oral settlement agreement. On February 1, 2018, the court denied the motion, in part because defendants did not object to the judgment within 15 days of the date it was mailed to their counsel on November 20, 2017. Defendants did not appeal the February 1, 2018, order, and it is not before us in this appeal from the December 7, 2017, judgment. But in defendants' appeal from the judgment, we agree the judgment must be modified to reflect the "exact terms" of the parties' oral settlement agreement.

III. DISCUSSION

A. The Court (Judge Cunnison) Did Not Vacate or Set Aside the Parties' July 24, 2017, Oral Settlement Agreement at the August 30, 2017, OSC Hearing

Defendants claim the court (Judge Sykes) erroneously granted plaintiff's motion to enforce the oral settlement agreement on November 8, 2017, and the judgment must therefore be set aside, because at the OSC hearing on August 30, 2017, the court (Judge Cunnison) "clearly stated the matter was not settled and that the case would be proceeding to trial." Based on Judge Cunnison's statements at the August 30 hearing, defendants claim they reasonably understood that "there was no longer a settlement and the matter would be resolved through trial."

We find no merit to this claim.

1. Relevant Background

At the outset of the August 30 OSC hearing, the court said: "You folks had a settlement. Has it been finalized?" Defendants' counsel then told the court that defendants had not signed plaintiff's proposed written settlement agreement because they disagreed with some of its terms—including that there should be a five- or 10-day grace period for the monthly payments, and whether the written agreement would provide that "judgment shall be entered" on the settlement amount, with or without reference to section 664.6. The court then asked the parties whether someone had ordered a transcript of the July 24 oral settlement agreement. The parties said they had not, and the court

advised the parties that they could agree to split the costs of the transcript in order "to resolve this difference."

The court then asked how long it would take to try the case. Plaintiff's counsel responded: "I think that everybody has agreed we have to have this thing done by settlement[,]" to which the court responded: "They [defendants] haven't agreed. How long will this case take to try?" (Italics added.) After plaintiff's counsel said it would take "[f]ive days" to try the case, and plaintiff's counsel said he had demanded a jury and had posted jury fees, the court set the matter for a five-day jury trial on January 12, 2018. Next, plaintiff's counsel asked whether the OSC hearing should be reset one week after August 30. The court responded by saying: "You can just file another notice of settlement. For now the OSC regarding dismissal after settlement is discharged. It's off calendar. If these little differences don't get resolved, see you on January 12th."

2. Analysis

Contrary to defendant's argument, the court (Judge Cunnison) did not vacate the parties' oral settlement agreement by setting the January 12, 2018, trial date at the August 30 OSC hearing. To the contrary, the court ostensibly set the trial date in order to motivate the parties to obtain a reporter's transcript of their July 24 oral settlement agreement, and use that transcript to resolve their differences concerning the terms of their written settlement agreement—before the January 12, 2018, trial date.

Moreover, at the time of the August 30 OSC hearing, neither party had filed a motion to enforce the oral settlement agreement. Thus, the validity of the oral settlement

agreement—including whether it was complete and binding on the parties, or whether it was conditioned upon the parties entering into a written agreement—was not before the court on August 30. The court's statement, "[t]hey [defendants] haven't agreed" to sign a written agreement does not mean the court vacated the oral settlement agreement. The court was plainly referring to a written settlement agreement, which defendants had just told the court they were refusing to sign.

B. The Judgment Must Be Amended to Reflect the \$500 Monthly Payment Terms

Defendants next claim the court "erred in signing an incomplete and inaccurate judgment which did not comport with the terms orally agreed to at the hearing of July 24, 2017 (and the terms ordered by the court at the hearing on November 8, 2017) in that it did not include the [exact] terms of payment." We agree.

Section 664.6 states: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court *or orally before the court*, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ." (Italics added.) The statute provides a summary procedure for enforcing such settlement agreements "by converting them into judgments." (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 797, 809.)

On a section 664.6 motion to enter judgment on a settlement agreement, "[i]t is for the trial court to determine in the first instance whether the parties have entered into an enforceable settlement. [Citation.]" (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) But "nothing in section 664.6 authorizes a judge to create the material terms of a

settlement, as opposed to deciding what terms the parties themselves have previously agreed upon. [Citation.]" (*Ibid.*, italics omitted.) And, "[o]nce the parties have reached a settlement . . . they 'may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms.' [Citation.]" (*Ibid.*)

As noted, the judgment omits the \$500 monthly payment terms the parties agreed to in entering into their oral settlement agreement in court on July 24, 2017. The judgment simply states: "Judgment in the sum of **\$22,500.00** is entered in favor of Plaintiff and Cross-Defendant, Alex Bohanek, and against Defendants and Cross-Complainants, Roger Balliger and Charity Balliger jointly and severally."

But, pursuant to the parties' July 24, 2017, oral settlement agreement, the parties agreed defendants would pay plaintiff \$22,500, in monthly installments of \$500 each, beginning on September 1, 2017, and continuing on the first day of each month until the \$22,500 sum is fully paid.⁵ Thus, on remand, the judgment must be modified, nunc pro tunc, effective December 7, 2017, to provide as follows:

"Judgment in the sum of \$22,500.00 is entered in favor of Plaintiff and Cross-Defendant, Alex Bohanek, and against Defendants and Cross-Complainants, Roger Balliger and Charity Balliger, jointly and severally, payable in monthly payments of \$500.00, beginning on September 1, 2017 and continuing on the first day of each month

⁵ It is undisputed that defendants did not pay the first \$500 monthly payment when it was due on September 1, 2017. But the parties' oral settlement agreement does not include an acceleration clause whereby the entire \$22,500 sum would have become immediately due and payable in the event defendants missed all or part of a monthly payment, or made a payment after the first day of the month.

thereafter until the \$22,500.00 sum is paid in full." (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1185-1186 [on remand, trial court must enter new judgment reflecting terms of parties' settlement agreement].)

The modified judgment will reflect the "exact terms" of the parties' July 24, 2017, oral settlement agreement. It will also reflect the judgment the court (Judge Sykes) directed plaintiff's counsel to prepare after the court granted plaintiff's motion to enter judgment on the parties' oral settlement agreement on November 8, 2017.6

IV. DISPOSITION

The judgment is affirmed with directions to modify the judgment, nunc pro tunc, effective December 7, 2017, to include the \$500 monthly payment terms the parties agreed to in their July 24, 2017, oral settlement agreement, as follows:

"Judgment in the sum of \$22,500.00 is entered in favor of Plaintiff and Cross-Defendant, Alex Bohanek, and against Defendants and Cross-Complainants, Roger Balliger and Charity Balliger, jointly and severally, payable in monthly payments of \$500.00, beginning on September 1, 2017 and continuing on the first day of each month thereafter until the \$22,500.00 sum is paid in full."

⁶ For the first time in their reply brief, defendants claim the parties' oral settlement agreement was conditioned upon the parties entering into a written settlement agreement. We deem this claim waived or forfeited. (*West v. JPMorgan Chase Bank*, *N.A.* (2013) 214 Cal.App.4th 780, 799.)

Defendants, Roger Balliger and Charity Balliger, shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278.)

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| | | | FIELDS | J. |
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| We concur: | | | | |
| McKINSTER | Acting P. J. | | | |
| RAPHAEL | J. | | | |